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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944

No. 183

CONRAD MARINO and GABRIEL VIGORITO,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI

J. BERTRAM WEGMAN,
Counsel for Petitioners.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

COME NOW CONRAD MARINO and GABRIEL VIGORITO and respectfully petition this Honorable Court for a reconsideration of their petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Eastern District of New York, whereby your petitioners were adjudged guilty of an unlawful possession of distilled spirits in containers bearing no internal revenue stamps, and were sentenced to imprisonment for a term of eighteen months.

The petition was submitted under number 183 of the October Term, 1944, and was denied by order filed October 9, 1944.

I

In this case your petitioners were each sentenced to serve eighteen months in the penitentiary on proof only that they possessed less than four gallons of potable alcohol, despite positive and unimpeached proof that such possession was *not* for the purpose of sale or manufacture into an article for sale.

The applicable statute specifically exempts such possession from its sanction.

II

Thus there is here presented a direct and unmistakable conflict between Circuit Courts of Appeals relating to a fundamental principle of proof in criminal cases.

III

The Court below held that the presumption arising from mere possession may be weighed against and may overcome the positive evidence to disprove it. This holding is not only in conflict with the decision of the Circuit Court of Appeals in the Eighth Circuit in *Ezzard* v. *United States,* 7 F. (2d) 808, but is in conflict with fundamental principles. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 286; *Tot* v. *U. S.,* 319 U. S. 463, 469.

IV

If a jury is to say in all cases whether evidence contrary to a presumption has weight and credibility enough to overcome it, then it is idle to speak of presumptions "disappearing" from the case. The submission of the question to a jury necessarily implies that there is something to be weighed against the proof; and where, as here, there is no evidence, that thing can only be the initial presumption.

The Trial Court recognized that the evidence produced by petitioners was sufficient, *prima facie.* But its sub-

mission to the jury, under instructions that the Government must overcome their defense beyond a reasonable doubt, was an evasion of its duty to direct a verdict, in the absence of *any* evidence to overcome it.

V

It would seem that at the very least there should have been some evidence, however slight, that these petitioners were engaged in the bootleg traffic, or somehow connected with it. There was none such. It was never even suggested that these petitioners had ever been so much as suspected of any traffic in un-taxpaid liquor.

VI

This Court may have overlooked the fact that the very necessity of showing that their possession was innocent compelled these petitioners to expose their previous bad record—altogether foreign to the liquor traffic—and thus inevitably to prejudice the jury against them. It is perfectly obvious that in a situation like that in the case at bar it is too much to expect a jury to give such facts only the weight which they deserve. It is hopeless when, as here, the prejudice is reinforced by inflammatory argument by the prosecutor, and by the Trial Judge's statements that there was proof of facts not in the testimony at all.

VII

Petitioners should not have to undergo imprisonment for a year and a half for a crime they clearly did not commit; but a more compelling consideration is that the doctrine of this case needs review in this Court if the basic conceptions of presumption of innocence, and of proof beyond a reasonable doubt, are not to be reduced to a mere empty form of words, devoid of substance.

This conviction is wrong, morally and legally. It is the more insidious because accomplished by what appears on

the surface to be proper procedure. It is that sort of factitious observance of the rules which leads to the most outrageous invasions of liberties which are supposed to be protected by the requirements of due process of law.

WHEREFORE, your petitioners pray that their petition for a writ of certiorari may be reconsidered. Counsel certifies that this petition is presented in good faith and the sincere belief that it has merit, and not for the purpose of delay.

And your petitioners will ever pray, etc.

CONRAD MARINO and
GABRIEL VIGORITO,
Petitioners,

by J. BERTRAM WEGMAN,
Counsel for Petitioners.